

**FARRIS MATHEWS BRANAN  
BOBANGO HELLEN & DUNLAP PLC**

ATTORNEYS AT LAW

HISTORIC CASTNER-KNOTT BUILDING  
618 CHURCH STREET, SUITE 300  
NASHVILLE, TN 37219

(615) 726-1200 telephone  
(615) 726-1776 facsimile

MEMPHIS DOWNTOWN  
One Commerce Square, Suite 2000  
Memphis, Tennessee 38103  
Telephone 901-259-7100  
Facsimile 901-259-7150

Charles B. Welch, Jr.  
cwelch@farrismathews.com

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MEMPHIS EAST  
7100 Ridgeway Loop, Road, Suite 400  
Memphis, Tennessee 38120  
Telephone 901-259-7120  
Facsimile 901-259-7180

Reply to  
Nashville Office

August 13, 2004

Chairman Pat Miller  
Attn: Sharla Dillon  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, Tennessee 37243-0505

RE: Petition of On-Site Systems, Inc to Amend its Certificate of Convenience and  
Necessity  
Docket 03-00329 & Docket 04-00045 (consolidated)

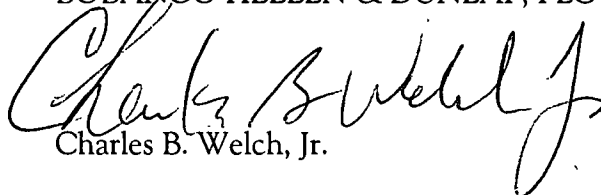
Dear Chairman Miller:

Please find enclosed one (1) original and fourteen (14) copies of East Sevier County Utility District's Memorandum of Law in opposition to the Grant of a Certificate of Convenience and Necessity for the Geographic Area Known as Sevier County, Tennessee in the above referenced matter. Please date and stamp a copy for our records.

Thank you for your assistance regarding this matter. If you have any questions, or if I may be of further assistance, please do not hesitate to contact me.

Very truly yours,

FARRIS MATHEWS BRANAN  
BOBANGO HELLEN & DUNLAP, PLC



Charles B. Welch, Jr.

CBW/ale

LATE FILED

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

<b>IN RE:</b>	)	
<b>PETITION OF ON-SITE</b>	)	<b>Docket No. 03-00329</b>
<b>SYSTEMS, INC. TO AMEND ITS</b>	)	
<b>CERTIFICATE OF CONVENIENCE</b>	)	<b>and</b>
<b>AND NECESSITY</b>	)	
	)	<b>Docket No. 04-00045</b>
	)	<b>(consolidated)</b>

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**MEMORANDUM OF LAW IN OPPOSITION TO  
THE GRANT OF A CERTIFICATE OF CONVENIENCE AND NECESSITY  
FOR THE GEOGRAPHIC AREA KNOWN AS SEVIER COUNTY, TENNESSEE**

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Comes now East Sevier County Utility District ("District"), by and through counsel, and, in conformance with the request of Randal Gilliam, the appointed Hearing Officer in this Contested Case, the District tenders this brief in response to two issues raised by Mr. Gilliam as follows:

- I. Will the present or future public convenience and necessity be served by granting Tennessee Wastewater a Certificate of Convenience and Necessity for the entirety of Sevier County, with the noted exceptions?
- II. What is meant by the phrase "utility water service" as used in Tennessee Code Annotated Section 6-51-301(a)(1)?

In response to those issues, the District states as follows:

- I. **WILL THE PRESENT OR FUTURE PUBLIC CONVENIENCE AND NECESSITY BE SERVED BY GRANTING TENNESSEE WASTEWATER A CERTIFICATE OF CONVENIENCE AND NECESSITY FOR THE ENTIRETY OF SEVIER COUNTY, WITH THE NOTED EXCEPTIONS?**
  - A. Tennessee Wastewater has failed to carry its burden of demonstrating that the present or future public convenience and necessity requires the grant of the requested Certificate of Convenience and Necessity.

Based on the record in this Docket, including the testimony of Charles Pickney at a hearing on July 13, 2004, the answer is clearly, “No.” It is not in the present or future public convenience and necessity that Tennessee Wastewater Systems, Inc. (“Tennessee Wastewater”) be granted the broad and expansive geography-based Certificate of Convenience and Necessity (“CCN”) it seeks for the entirety of Sevier County.

“Public convenience and necessity” is a term of art in the Tennessee Code with an elusive definition and no definitive criteria—at least not in the context provided by this proceeding. The tenets of statutory construction require some meaning be ascribed to the words and phrases used by the legislature in drafting the statute. No definition of the phrase “public convenience and necessity,” however, is provided.

The term is used in more than 30 Code sections in many different contexts in addition to the use in 65-4-201, dealing with the grant of a CCN to a public utility. While the Tennessee Regulatory Authority is called on routinely to make a determination as to whether the public convenience and necessity will be served by granting the request of a public utility for a CCN, there appears to be no definitive criteria by which that determination should be made, particularly in the context of a request for a geography-based CCN for the provision of wastewater services to an entire county.

As in any proceeding, the burden is on the movant, in this case Tennessee Wastewater, to demonstrate that public convenience and necessity will be served by the grant of such a CCN. That burden is particularly evident, however, as Tennessee Code Annotated Section 65-4-201 demands that the public convenience and necessity require the issuance of the requested CCN. Tennessee Wastewater has failed to carry its burden, and its request should be denied.

The consistent refrain throughout the pleadings and in the testimony of Mr. Pickney is that the grant of the CCN herein sought would serve the convenience of Tennessee Wastewater, and occasional reference is made to the convenience of the Tennessee Regulatory Authority (“TRA”). What has not been shown, however, is how the convenience and necessity of the public would be served. The public, after all, is the object of the efforts of the TRA, not Tennessee Wastewater or the TRA itself. What is absent from any of Mr. Pickney’s testimony is any demonstration of how the public convenience and necessity would be served by the grant of such a CCN. It is the position of East Sevier County Utility District that it would be detrimental to the public to issue the requested Certificate of Convenience and Necessity.

Mr. Pickney repeatedly makes the argument that it would be much more convenient for Tennessee Wastewater to come to the TRA once for this expansive, geography-based CCN as opposed to petitioning on a project-by-project basis. See Response to Data Inquiry, filed May 16, 2003; Transcript of Proceedings, July 13, 2004, passim. No evidence is provided or even offered, however, as to how this convenience to Tennessee Wastewater translates into the required convenience and necessity of the public.

By Mr. Pickney’s own testimony, however, the burden of project-based CCNs is inconvenient. Mr. Pickney admitted under examination by the Hearing Officer that Mr. Pickney has a template for the preparation of these requests, and that the hearings take no more than ten minutes. Additionally, Mr. Pickney indicates that Tennessee Wastewater collects at least forty cents per month from every customer to cover the cost of these proceedings. Based on his testimony and the mathematics performed at the hearing by Scott Thomas, counsel to the City of

Pigeon Forge, Tennessee Wastewater is already receiving \$1,000 a year from rate payers in Sevier County alone for the preparation and filing of these template-based petitions.

Considering that Tennessee Wastewater, by the testimony of Mr. Pickney, has no cost or expense in the construction of these wastewater treatment systems, and has the systems turned over to Tennessee Wastewater at no cost or expense to the company, the de minimis cost, both in time and expense, of completing a template form and a ten- minute appearance before the TRA for a project-based CCN does not mitigate sufficiently against the interest of the public to require the grant of a geography-based CCN of this magnitude.

Additionally, the convenience of the Tennessee Regulatory Authority, ostensibly served by obviating the need for project-based requests for CCNs, certainly is not a consideration focused on the public convenience and necessity. In its Response to Data Inquiry, Tennessee Wastewater states:

If we continue to petition one development at a time, at the rate of twelve ever [sic] three years, we could reasonably expect to submit thirty-six (36) petitions in Sevier County in the next nine (9) years. This seems to me to be a waste of time and resources of the Tennessee Regulatory Authority, On-Site Systems, and everyone else involved. Response to Data Inquiry, may 16, 2004, p.2.

While the math is good, the critical issue is the convenience and necessity of the public. Here, only the convenience of Tennessee Wastewater, the TRA, and “everyone else involved” is all that is considered in the only clearly stated rationale offered for granting this geography-based CCN. There is no offer of a basis as to how this geography-based CCN serves the convenience and necessity of the public because there is no such basis. If there were, it would have been offered as a part of the Response to Data Request, particularly given that the quoted language

was in response to the question, “Provide an explanation as to why it is in the public interest that On-Site be granted the proposed service territory within Sevier County.”

Even when prodded by the Hearing Officer for any additional bases on which to justify the grant of the geography-based CCN (Transcript of Proceedings, July 13, 2004, pp. 26-27), Mr. Pickney could articulate no basis of consequence other than “convenience to the general contractors that the company works with” and “general administrative cost of coming to the TRA and filing individual petitions.” Neither contemplates the convenience and necessity of the public, the requirement of Tennessee Code Annotated Section 65-4-201.

Finally, when asked to identify the “primary reason” for the request for this countywide CCN, Mr. Pickney’s response was that the “major part of it” was to cut down on administrative costs and time delay. See Transcript of Proceedings, July 13, 2004, p. 44.

**B. The only apparently applicable criteria in the Tennessee Code for a determination of when the public convenience and necessity is served that relates to the matter at hand militates against the CCN requested by Tennessee Wastewater.**

Given the lack of definitive criteria in 65-4-201 by which to judge “public convenience and necessity,” it is not inappropriate to turn to other sections of the Code for assistance.

A similar “public convenience and necessity” analysis must be made when the issue of the creation of a utility district comes before a county mayor under Tennessee Code Annotated Section 7-82-202. After public notice and a public hearing, the county mayor is called on to make a determination “on the issue of whether the public convenience and necessity requires the creation of the district.” The county mayor is required to consider, in its determination, two criteria. The first is the review and final comments of the utility management review board (a

criterion not applicable to this context). The second and only other defined consideration is “the ability of an existing utility district or an incorporated city or town to serve the area.”

To the extent guidance may be had from this analogous section of the Code, and given that there have been interventions by the District, an existing utility district, the City of Pigeon Forge, an incorporated city, and IRM, another privately-owned public utility, all apparently willing and interested in providing wastewater treatment services within the geography-based CCN area, neither public convenience nor necessity requires the issuance of the CCN requested by Tennessee Wastewater.

As a practical matter, with the exception of the City of Pigeon Forge, the other intervenors are actively competing with Tennessee Wastewater to provide wastewater treatment services throughout Sevier County. It cannot be in the public convenience and necessity to award what Tennessee Wastewater perceives as an exclusive right to provide service when not only another public utility is willing to provide those same services on a project-by-project basis, but when a local governmental entity (the District) is also willing to provide such services.

As Commissioner Miller indicated at the hearing on the District’s Petition for Reconsideration and Intervention conducted on April 26, 2004:

. . . one of the threshold questions we ask when we grant those amendments to the CCN is, is there anybody out there in municipal government or county government or an instrumentality of city or county government willing to provide that service. And that’s the issue that we’re facing here today.

And it seems like we granted it under the belief that nobody else was interested in city or county government in Sevier County of providing that, and now we’re learning later that there is an interest. . . . the utility itself has expressed an interest . . .

Transcript of Proceedings, April 26, 2004, pp. 10-11.

Of course, Commissioner Miller was not construing Tennessee Code Annotated Section 7-82-202. He was, however, applying precisely the same analysis in the context of Tennessee Code Annotated Section 65-4-201: is there any other utility district or incorporated city or town willing to provide the service. If so, it cannot be required by the public convenience and necessity to award the expansive, geography-based CCN sought by Tennessee Wastewater in this Docket. Amendments to Tennessee Wastewater's CCN must be sought and either awarded or denied on a project-by-project basis.

C. The award of a large, geography-based CCN to Tennessee Wastewater would be anti-competitive, and would not serve the best interest of the public.

Tennessee Wastewater asserts, "After review and approval, TRA will grant OSI the certificate that prevents any other privately owned, public utility company from attempting to provide sewer service to those same areas." See Response to Data Request, filed May 16, 2003.

This position, taken in writing by a Vice-President of On-Site Systems, Inc., predecessor to Tennessee Wastewater, combined with Tennessee Wastewater's continued refusal to deal with the District in the same manner as with the City of Pigeon Forge, establishes the approach Tennessee Wastewater intends to take in the event it is granted the geography-based CCN requested in this cause.

It has always been the policy of the Authority to promote competition and the orderly development of competitive markets. A grant of the Sevier County-wide CCN to Tennessee Wastewater will effectively create a competitive advantage for no logical reason. Other privately owned, competing providers will be subject to significant delays in the certification process for particular sites within Sevier County. Tennessee Wastewater would not be subject to such



requirements and, pending approval of a competing provider, Tennessee Wastewater will, as evidenced by testimony, market its services as that of a monopoly provider.

Unlike the facilities of other types of public utilities, waste water treatment systems are site specific. These systems are not complex networks spanning large territories. The particular sites to which service is provided are, by most public utility standards, very small and the systems are relatively inexpensive. In fact, the utility does not even make an investment to construct the system. The system is actually dedicated by the developer to the utility by way of private agreement. The nature of these transactions, their impact on competition and consumer choice, and varying characteristics of particular real estate developments demand that consideration and approval of CCNs occur on a site by site basis.

## **II. WHAT IS MEANT BY THE PHRASE “UTILITY WATER SERVICE” AS USED IN TENNESSEE CODE ANNOTATED SECTION 6-51-301(a)(1)?**

The only case construing this language in the context of wastewater treatment services that was able to be found is an unreported decision of the Middle Section of the Tennessee Court of Appeals, Lynnwood Utility Co. v. City of Franklin, 1990 WL 38358 (Tenn. Ct. App. 1990). A copy of the decision is attached hereto as Exhibit A.

At issue in Lynnwood was an annexation by the City of Franklin, which included territory encompassed by a CCN issued to Lynnwood Utility Company, a privately-owned public utility, by the Tennessee Public Service Commission. The CCN was issued to provide utility sewer service. Lynnwood was providing sewer service to a portion of the area encompassed by its CCN, but had not extended its system to certain undeveloped areas of its designated service

district. It had never refused to do so, but at the same time, there had never been a request for service in the undeveloped area.

As a result of a pending development of a large tract of land, part of which was within the area contemplated by Lynnwood's CCN, the City of Franklin annexed the area, and agreed to provide water and sewer service to the development. Lynnwood demanded compensation for the City's "taking" of its right to provide sewer service in the portion of the annexed area covered by Lynnwood's CCN. After the trial court found in favor of the City on the City's Motion for Summary Judgment, Lynnwood appealed arguing that the phrase "utility water service" included sewer service, and that Lynnwood was entitled to compensation for the City's "taking" of its intangible right to provide that service, notwithstanding that Lynnwood had never constructed any physical facilities within the area annexed.

In a carefully worded decision, the Middle Section refused to hold that the phrase "utility water service" included sewer service, and ultimately held that

While an intangible right to provide sewer services might have some value in the context of the "law of eminent domain, (citations omitted), damages under Tenn. Code Ann. § 6-51-301(a)(2) are limited to replacement costs. There is no replacement cost as contemplated by Tenn. Code Ann. § 6-51-301(a)(2) for an intangible right to provide sewer services.

Lynnwood, 1990 WL 38358, at 4.

The Lynnwood court actually left open the issue of whether "utility water service" included sewer service. While it addressed the issue, it did so by providing, "For the purposes of this opinion we assume, without holding, that the term 'utility water service' in the statute includes sewer service and that the sewer service provided by Lynnwood comes within the statute." Lynnwood, 1990 WL 38358, at 3.

The court held, as the basis of its decision, that the term “facilities,” as used in the statute means physical facilities, not a right to construct physical facilities and not a right to serve an area. Further, the court stated that Lynnwood had not cited any authority, nor had the court found any authority that a right to serve the annexed area is a facility” which is compensable under the statute. Lynnwood, 1990 WL 38358, at 3.

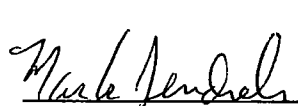
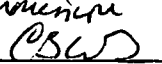
Therefore, a concise response to the Hearing Officer’s inquiry as to what is meant by the phrase “utility water service” in Tennessee Code Annotated Section 6-51-301 is not possible.

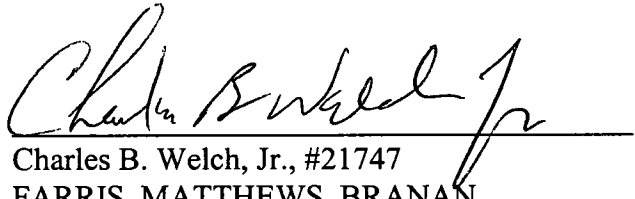
### **CONCLUSION**

Wherefore, East Sevier County Utility District respectfully requests the Hearing Officer deny Tennessee Wastewater’s request for a geography-based CCN for the entirety of Sevier County, as:

- a) Tennessee Wastewater has failed to show how such a CCN is required by the present or future public convenience and necessity;
- b) the only statutory criteria construing “public convenience and necessity” would require the denial of the requested CCN; and
- c) such an expansive, geography-based CCN is anti-competitive and is counter to the best interest of the public.

Respectfully submitted this 13<sup>th</sup> day of August, 2004.

 *with permission*  
  
Mark Jendrek, #12993  
MARK JENDREK, P.C.  
P.O. Box 549  
Knoxville, Tennessee 37901  
865/824-1900

A handwritten signature in black ink, reading "Charles B. Welch, Jr.", is positioned above a horizontal line. The signature is fluid and cursive, with a prominent "Jr." at the end.

Charles B. Welch, Jr., #21747  
FARRIS, MATTHEWS, BRANAN,  
BOBANGO HELLEN & DUNLAP, PLLC  
618 Church Street, Suite 300  
Nashville, Tennessee 37219  
615/726-1200  
Attorneys for East Sevier County Utility District

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the above and foregoing Motion has been served upon the following persons on this 13<sup>th</sup> day of August, 2004 by U.S. Mail, postage prepaid:

Donald L. Scholes  
Branstetter, Kilgore, Stranch & Jennings  
227 Second Avenue North, 4th Floor  
Nashville, Tennessee 37201-1631

G. Scott Thomas  
Bass, Berry & Sims, PLC  
AmSouth Center  
315 Deaderick Street, Suite 2700  
Nashville, TN 37238

  
CHARLES B. WELCH, JR.